Supreme Court of the United States.

No. 229.—October Term, 1905.

George F. Albright, Appellant,
vs.
The Territory of New Mexico ex rel Jesus M. Sandoval.

Appeal from the Supreme Court of the Territory of New Mexico.

[January 2, 1906.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a proceeding in *quo warranto* brought in the District Court of Bernalillo County, New Mexico, July 20, 1903, by the Territory on the relation of Jesus M. Sandoval against George F. Albright, it being alleged that Sandoval was duly elected to the office of assessor of Bernalillo County for the term of two years from the first day of January, 1903; that he duly qualified and entered on the discharge of the duties of the office; and that he had never resigned, vacated or abandoned the office, and ever since his election and qualification had continued to discharge the duties thereof. It was further alleged that on March 23, 1903, respondent Albright, without authority of law, unlawfully usurped the office and took possession of the assessor's room in the court house and of the books, papers and other insignia of office, claiming office by virtue of a pretended appointment by the board of county commissioners of Bernalillo County, made under the authority of an act of the legislative assembly of the Territory of New Mexico, entitled "An act to create the county of Sandoval," approved March 10, 1903, as amended by an act entitled "An act to amend section 3 of an act entitled 'An act to create the county of Sandoval,'" approved March 12, 1903.

Judgment was rendered by the District Court in favor of Albright, August 3, 1903, and carried to the Supreme Court of the Territory, which reversed the judgment and remanded the cause with directions to the court below to reinstate it and proceed in accordance with the views expressed in its opinion. 78 Pac. Rep. 204. The mandate was filed below October 19, 1904, and on the 19th of November the District Court entered judgment "that the respondent, George F. Albright, has unlawfully usurped, and does unlawfully usurp, the office of assessor of the county of Bernalillo and Territory of New Mexico, from the relator, Jesus Maria Sandoval, the lawful incumbent of the said office; that the said respondent, George F. Albright, do henceforth cease and desist from in any manner

intermeddling with, or attempting to perform the duties, or exercise the functions of the office of assessor of the county of Bernalillo aforesaid, and that he forthwith deliver up to the relator the records, books, papers and furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico as the lawful custodian thereof," and for costs.

The case was again carried to the Supreme Court and heard upon a motion to dismiss, and on the merits, and February 24, 1904, the court denied the motion to dismiss, modified the judgment of the District Court by striking out the words "and that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico, as the lawful custodian thereof," and affirmed the judgment as so modified. 79 Pac. Rep. 719. On the same day an appeal was allowed to this court, a supersedeas bond given, which was approved March 9, 1905, and the record was filed here April 17. The case comes before us on a motion to dismiss.

The ground assigned for the motion is the expiration of the term of the office of assessor of the county of Bernalillo and the consequent lack of power to grant appellant any effectual relief. But the same motion has already been considered and denied by the Supreme Court of the Territory, and its renewal here amounts to no more than an assignment of error to the action of that court in this regard, to be passed on and disposed of as such, if otherwise we have jurisdiction of the case. If we have not, the appeal must be dismissed even though for reasons not put forward in support of the motion. The opinion of the Supreme Court fully discussed the authorities on the subject of the right to have a review of the judgment on appeal after the expiration of the term of office involved in the proceeding in *quo warranto*. The court refused to dismiss the writ, holding that the statute, 9 Anne, c. 20, § 5, providing that in addition to judgment of ouster, fine and costs may be imposed, was a part of the common law of the Territory, and also that the judgment might affect the rights of the parties in another litigation in relation to the emoluments of the office.

The appeal to this court was taken under the statute of March 3, 1885, 23 Stat. 443, c. 355; *Shute* v. *Keyser*, 149 U. S. 649. Both sections of that act apply to cases where there is a matter in dispute measurable by some sum or value in money, although the amount is not restricted under the second section. *Washington & Georgetown Railroad Company* v. *District of Columbia*, 146 U. S. 227; *Farnsworth* v. *Montana*, 129 U. S. 104. In proceedings in *quo warranto*, such as those in this case, the alleged usurpation is the matter in dispute and the liability to a fine on judgment of ouster does not make that matter measurable by some sum or value in

money. As in criminal cases, the fine is "in the eye of the law, a punishment for the offense committed, and not the particular object of the suit." *United States* v. *More*, 3 Cranch, 159, 174. Moreover, appellant could hardly be allowed to invoke our jurisdiction on the ground that if his appeal were sustained he might be fined on a new judgment.

The term of office had expired before the rendition of judgment by the Territorial Supreme Court, and as to the effect of the judgment of ouster in a suit to recover emoluments for the past, that is collateral, even though the judgment might be conclusive in such subsequent action. *New England Mortgage Security Company* v. *Gay*, 145 U. S. 123; *Washington & Georgetown Railroad Company* v. *District of Columbia*, 146 U. S. 227.

Appeal dismissed.

True copy.

Test:

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above entitled cause for the following reason, to-wit: because the term of the office of assessor of the county of Bernalillo, in the Territory of New Mexico, expired on the 1st day of January, 1905, and it is not within the power of the court to grant the appellant any effectual relief in this case.

NEILL B. FIELD,
Attorney for Appellee.

BRIEF ON ABOVE MOTION

STATEMENT OF THE CASE

This was a proceeding by *quo warranto* to try the title of the appellant, George F. Albright, to the office of assessor of Bernalillo county, New Mexico, for a term which, as shown by the record, expired January 1st, 1905. (*Transcript p.* 3, *folio* 6). The district court of Bernalillo county, in the first instance, sustained the title of appellant; but, on appeal, that judgment was reversed. The case was remanded to the district court, where an amended answer was filed by appellant; and, on the 19th day of November, 1904, judgment of ouster was rendered by the district court, (*Transcript p.* 20, *folio* 32). The case was taken on error to the supreme court of New Mexico, where, on January 10th, 1905, it was argued on a motion to dismiss or affirm, (*Transcript p.* 22, *folio* 35). On Feb-

ruary 24th, 1905, the supreme court modified the judgment of the court below, and affirmed it, and, on the same day, allowed an appeal to this court, and on the following day allowed a supersedeas, fixing the amount of the bond in the sum of fifteen thousand dollars, (*Transcript pp.* 23, 24, 25). In the opinion filed, on the last appeal, the court discussed at great length the right to review the judgment of the court below after the expiration of the term of office, and held that such right to review existed, notwithstanding the expiration of the term. This conclusion seems to be based upon two propositions:

First. That by the statute of 9th Anne, which is said to be a part of the common law of New Mexico, a court, in a proceeding by *quo warranto,* has power to inflict a fine against one who usurps an office or franchise; and,

Second. That the judgment in this case may affect the rights of the parties in another litigation.

If the trial court had inflicted a fine against appellant, there would be force in the suggestion that he could prosecute an appeal to be released from it, but it is not perceived that he can have a right to prosecute an appeal in order to give the trial court an opportunity to fine him on another trial. It is probably true that the judgment in this case will affect his rights in another litigation, but that is not sufficient to require this court to review the case.

Counsel for appellee submits the following in support of the motion to dismiss:

I.

THE TERM OF THE OFFICE WHICH WAS IN CONTROVERSY HAVING EXPIRED, THERE IS NOTHING UPON WHICH A JUDGMENT CAN OPERATE, AND THIS COURT CAN GIVE THE PLAINTIFF IN ERROR NO EFFECTUAL RELIEF.

The sole purpose of this proceeding was to determine the title of appellant to the office of assessor of Bernalillo county, for the term which expired January 1st, 1905. It is true that the district court attempted to adjudicate the title of the relator, Sandoval, also, but the supreme court of New Mexico modified the judgment of the district court, and struck out so much of it as passed upon the relator's right, eliminating the following words from the judgment of the district court:

> "And that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of assessor of the county of Bernalillo and Territory of New Mexico, as the lawful custodian thereof."
>
> (*Transcript p.* 23).

When this was done, the term of office had expired, and it was impossible for the supreme court of New Mexico to make its action effective. The judgment of the district court, rendered on the 19th day of Novem-

ber, 1904, (*Transcript pp.* 20, 21), in so far as it was a judgment of ouster, at least, was self-executing.

Foster v. Kansas, 112 *U. S.* 201.
Wilson v. North Carolina, 169 *U. S.* 598.

Its effect was to remove appellant and leave the office vacant; it needed no execution to carry it into effect. The reversal of the judgment, after the expiration of the term, could not put the appellant back into office, nor could it be made effectual in any manner. That the supreme court of New Mexico entertained the view that a judgment in this case might be made the basis of a suit for the emoluments of the office, and, therefore, the right to review after the expiration of the term necessarily existed, is manifest from its opinion:

> ". . . . How far the judgment in this proceeding is, independent of the statute such as exists in California and Wisconsin, available as a basis for an action for the emoluments of the office involved, we need not now determine. We note, however, that the defendant in error contends that 'the judgment of the district court will affect the rights of the parties in another litigation with reference to the emoluments of the office.' If his position as to this be correct, then his motion is met by all of the cases above cited, which hold that when the effect of the judgment is to establish the basis of a suit to recover emoluments, the action continues. Otherwise it would be within the power of the usurper of an office, by resignation pending the suit, to evade all liability; or by dilatory tactics and by availing himself of the law's delays to prolong the duration of almost every suit of this kind beyond the term of office involved and thus to come free of costs, fine or